IN THE SUPREME COURT

Original Proceeding on Request for Advisory Opinion from the House of Representatives

***In re* REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2005 PA 71**	)))	**Supreme Court No. 130589**

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR VOTING RIGHTS LEGISLATIVE FUND AND KEVIN FOBBS SUPPORTING THE CONSTITUTIONALITY OF 2005 PA 71

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STATEMENT OF QUESTION PRESENTED

As stated in this Court's April 26, 2006 Order granting the request of the House of Representatives for an advisory opinion, 712 N.W.2d 450, the Question Presented is:

> Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?

Amici filing this Brief answer: "No."

INTEREST OF THE AMICI

Amicus Curiae The American Center for Voting Rights Legislative Fund (ACVR) is a bi-partisan, national non-profit organization devoted to common sense reforms that promote confidence in our Nation's electoral system.

ACVR was founded in February 2005 on the belief that public confidence in our electoral system is the cornerstone of our democracy. The organization was established to further the common good and general welfare of citizens of the United States by educating the public about the importance of our electoral process, and by supporting efforts to increase public participation and confidence in our electoral process. ACVR supports election reforms such as those developed by the Commission on Federal Election Reform co-chaired by former President Jimmy Carter and former Secretary of State James Baker (the "Carter-Baker Commission") that will make it easy to vote but hard to cheat, and that protect the right of all citizens to participate in the electoral process free of intimidation, discrimination or harassment.

ACVR works for equal access to the ballot—free from harassment or intimidation—for all eligible citizens irrespective of their race, gender or partisan

affiliation. Where necessary, ACVR also defends the rights of voters to participate in the electoral process through litigation.

ACVR neither supports nor endorses any political party or candidate.

Kevin Fobbs is a registered Michigan voter and the President of National Urban Policy Action Council (NuPac), a non-partisan civic and citizen-action organization. Mr. Fobbs is host of a news talk radio program, "The Kevin Fobbs Show," on WDTK-1400-AM in Detroit, is a contributing columnist for the Detroit News, and the Government Affairs Director of Soul Source Magazine. Mr. Fobbs is African American.

Reasonable photo identification requirements are one form of common sense reform supported by *Amici.* As explained below, photo identification regulations enjoy broad, bi-partisan public support as a means of preventing voter fraud. They are nondiscriminatory and do not reduce minority—or other—participation. Indeed, because voter identification requirements increase voter confidence in the fairness and integrity of elections, they may help to increase voter participation.

Because of their interest in promoting reforms – such as photo identification laws – that increase the integrity of, and public confidence in, the electoral system, *Amici* respectfully request leave to participate as *amici curiae* and to present their views on three issues of central importance. *First*, *Amici* believe that it is critical that—as recognized by the United States Supreme Court—a flexible standard of review rather than strict scrutiny be applied to reasonable, nondiscriminatory regulations that do not impose severe restrictions on the right to vote. Applying strict scrutiny would prevent the development by the States of sensible methods necessary to prevent fraud and increase

voter confidence and participation. *Second*, *Amici* describe evidence that voter fraud – or at a minimum circumstances that create an unacceptable risk of voter fraud – exist both in Michigan and across the Nation, and justify the sort of reasonable, nondiscriminatory protective measures reflected in 2005 PA 71. *Third*, *Amici* explain that photo identification requirements like those contained in 2005 PA 71 are a reasonable and nondiscriminatory fraud prevention measure that do not impose a severe or unreasonable burden on the right to vote. Because such requirements clearly serve the State's important interest in preventing fraud and increasing public confidence in the electoral process, *Amici*'s proposed Brief argues that reasonable photo identification requirements like those contained in 2005 PA 71 are plainly constitutional.

SUMMARY OF ARGUMENT

It is clear that the right to vote is a fundamental right. It is equally clear that the Constitution assigns the States considerable authority to regulate the electoral process. As the Supreme Court has recognized, "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). By helping ensure that elections are fair and honest, such State regulations protect rather than interfere with the right to vote.

In balancing these two important interests—the individual's right to vote and the State's (and citizens') interest in fair and honest elections—the United States Supreme Court has adopted a "flexible standard" of review, in which the rigorousness of the inquiry depends on the extent of the burden the regulation imposes on the right to vote.

Burdick v. Takushi, 504 U.S. 428, 433 (1992). While regulations which impose "severe" burdens are subject to strict scrutiny, those imposing lesser burdens are subject to less intensive scrutiny. *Id.* Under this "flexible standard," "reasonable, nondiscriminatory restrictions will ordinarily be sustained if they serve important regulatory interests." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J. concurring). Caselaw applying the Michigan Constitution to challenges to election regulations apply federal standards, and strict scrutiny is therefore also inappropriate under the State's Constitution.

Reasonable photo identification requirements easily satisfy this flexible standard of review. They are a highly popular, nonpartisan and nondiscriminatory measure that is clearly directed to preventing fraud and increasing voter confidence—two important (indeed compelling) government interests. The Michigan Legislature is constitutionally empowered to address these concerns both by the federal Constitution, but also by Article 2, § 4 of the Michigan Constitution, which *requires* the Legislature to enact measures "to preserve the purity of elections," and "to guard against abuses of the elective franchise." The need for such fraud-prevention and confidence-building measures is underscored by accounts of voter fraud, or circumstances rife with the potential for such fraud, in Michigan and across the country, and by survey data showing that almost one-third of Americans have lost confidence in the Nation's electoral machinery. Weighed against these compelling interests, photo identification requirements impose at most a minor burden on the right to vote and they do not disenfranchise minority (or other) voters—as

their critics claim. Indeed, by increasing voter confidence in the electoral process they may increase voter participation.

If this Court determines that 2005 PA 71 does not violate either the federal or Michigan Constitutions, local election officials and Michigan's Secretary of State must implement the law in the November 2006 general election. *Amici* accordingly respectfully request that this Court make its determination based on the parties' briefing and without oral argument, and strive to issue its opinion before September 2006.

ARGUMENT

I. REASONABLE, NONDISCRIMINATORY REGULATIONS THAT DO NOT SEVERELY BURDEN THE RIGHT TO VOTE – LIKE PHOTO IDENTIFICATION REQUIREMENTS – ARE CONSTITUTIONAL IF THEY SERVE IMPORTANT GOVERNMENT INTERESTS

2005 PA 71 continues in effect, largely unchanged, a photo identification requirement first enacted by the Michigan Legislature in 1996. *See* 1996 PA 583. As this Court is aware, the amendment to MCL 168.523 have never been implemented, due to Attorney General Opinion No. 6930, issued by former Michigan Attorney General Frank J. Kelley on January 29, 1997, which opined that the photo identification requirement was unconstitutional under the federal Equal Protection Clause. Opinion No. 6930 depended, in large part, on Attorney General Kelley's legal conclusion that "strict scrutiny" applied to the photo identification requirement, under which "the State has the burden of demonstrating that the particular regulation is necessary and essential and not achievable by any less drastic means." (Citation, internal quotations omitted).

Opinion No. 6930's application of a "strict scrutiny" analysis to reasonable and nondiscriminatory photo identification requirements is demonstrably erroneous.[1] The appropriate standard governing judicial review of State election regulations is of great importance to the ability of States to develop reasonable efforts to prevent voter fraud and increase public confidence in the elections States hold. If the courts apply strict scrutiny, as Attorney General Opinion 6930 suggests, only efforts that are necessary to further a compelling state interest will survive judicial review, and States may be saddled with the burden of presenting evidence proving the necessity of each and every legislative or administrative policy judgment reflected in their election laws. And, although reasonable voter identification requirements—such as the photo identification requirements at issue in this case—should survive even strict scrutiny, many reasonable fraud prevention efforts might not. Accordingly, for groups like ACVR and the individual *Amicus* who strongly support reasonable, nondiscriminatory fraud prevention efforts, the applicable standard of review is critical.

Fortunately, there should no longer be any doubt as to what standard of review applies. In numerous decisions dating back more than 20 years, the Supreme Court has made clear that a "flexible standard" of review is to be applied to state regulations of the electoral process. Employing this approach, if the burden imposed on the right to vote is not severe, "reasonable, nondiscriminatory restrictions will ordinarily be sustained if they

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[1] This Court is, of course, not bound by the Attorney General's Opinion. *See, e.g., Indenbaum v. Michigan Dep't of Licensing & Reg.*, 213 Mich. App. 263, 274, 539 N.W.2d 574, 580 (1995).

serve important regulatory interests." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J. concurring).

As the Court explained in *Burdick v. Takushi*, 504 U.S. 428 (1992):

> Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.
>
> It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe "[t]he Times, Places and Manner of Holding Elections for Senators and Representatives," Art. I § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulations of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.
>
> Election laws will invariably impose some burden upon individual voters. . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . .
>
> Instead, . . . a more flexible standard applies. A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forth by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, we have recognized that when those rights are subjected to "severe" restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision

> imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Id. at 432-34 (certain citations and internal quotations omitted).

In the intervening years, the Court has continued to explain that reasonable, nondiscriminatory restrictions on voting rights are subject to this flexible standard of review, under which they will be upheld if they serve important State interests. In its most recent extended discussion of the subject, the Court explained:

> [N]ot every electoral law that burdens associational rights is subject to strict scrutiny. Instead, as our cases since *Tashjian* [*v. Republican Party of Conn.*, 479 U.S. 208 (1986),] have clarified, strict scrutiny is appropriate only if the burden is severe.

Clingman v. Beaver, 544 U.S. 581, 592 (2005) (citations omitted). In *Clingman*, the Court upheld Oklahoma's semiclosed primary system, holding that it did not violate the right to freedom of association of the Libertarian Party of Oklahoma or of individual voters. With respect to the standard of review, the Court explained:

> These minor barriers between voter and party do not compel strict scrutiny. To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question "that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons* [*v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)]; *Storer v. Brown*, 415 U.S. 724, 730 (1974). . . .
>
> When a state electoral provision places no heavy burden on associational rights, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons*, 520 U.S. at 358.

544 U.S. at 592 (certain citations omitted).[2]

As *Amici* explain *infra*, Michigan's photo identification requirement does not present the sort of "severe" burden on an individual's exercise of the right to vote that might trigger a strict scrutiny analysis. Under the "flexible standard" which accordingly applies, there is no need for the legislature to have had *admissible, empirical evidence* to support its legislative determination that a photo identification requirement was warranted. *See, e.g., Timmons*, 520 U.S. at 364 ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justification.").

The "flexible standard" applied in *Burdick*, *Clingman*, and similar cases should also govern this Court's analysis under the Michigan Constitution. This Court's decisions addressing challenges to particular election regulations apply federal precedent to interpret the correlative provisions of Michigan's Constitution. *See Michigan State UAW Community Action Program Council v. Austin*, 387 Mich. 506, 514, 198 N.W.2d

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[2] In her concurring opinion in *Clingman*, Justice O'Connor (joined by Justice Breyer) agreed that strict scrutiny did not apply:

> We have sought to balance the associational interests of parties and voters against the States' regulatory interests through the flexible standard or review reaffirmed by the Court today. Under that standard, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." Regulations imposing severe burdens on associational rights must be narrowly tailored to advance a compelling government interest. Regulations imposing lesser burdens are subject to less intensive scrutiny, and reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests.

544 U.S. at 602-03 (O'Connor, concurring) (citations omitted).

385, 387 (1972); *Wilkins v. Bentley*, 385 Mich. 670, 680-82, 189 N.W.2d 423, 427-28 (1971).[3]

II. PHOTO IDENTIFICATION LAWS ARE REASONABLE, NONDISCRIMINATORY AND NONPARTISAN EFFORTS TO PREVENT FRAUD AND INCREASE VOTER CONFIDENCE, WHICH IMPOSE, AT MOST, A MINIMAL BURDEN ON THE RIGHT TO VOTE; SUCH MEASURES ARE PLAINLY CONSTITUTIONAL.

Photo identification laws easily satisfy this flexible standard of review.[4] Although their critics like to portray them as partisan and discriminatory laws that disenfranchise minority voters, the evidence shows just the opposite.

A. Photo Identification Laws Further Important Government Interests.

1. Court Decisions Recognize the Importance of the Government's Interest in Ensuring the Integrity of Elections.

Photo identification laws serve important—indeed, critical—State interests: preventing voter fraud (and the attendant dilution of the votes of legitimate voters), and

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[3] Both *Michigan State UAW* and *Wilkins* applied a strict-scrutiny analysis. However, those cases applied that analysis in reliance on United States Supreme Court decisions; as explained *supra*, the Supreme Court's more recent caselaw makes clear that strict scrutiny is *in*applicable where – as here – election regulations impose anything less than a "severe" burden on the right to vote. In addition, both *Michigan State UAW* and *Wilkins* found such a "severe" burden in the cases before them. *Michigan State UAW*, 387 Mich. at 517, 198 N.W.2d at 388 (finding that statute purging inactive voter registration "is indeed a serious impediment on the right to vote for a substantial number of citizens"); *Wilkins*, 385 Mich. at 683-84, 189 N.W.2d at 428-29 (rejecting State's argument that regulation at issue "involves merely a rebuttable presumption" as to the residence of college students, and instead finding that, under the challenged regulation, "the elective franchise is witheld from students"). As explained *infra*, the photo identification requirement of 2005 PA 71 cannot be characterized as a "severe" burden on the exercise of the right to vote.

[4] Although the Court need not reach the issue since it is clear that a flexible standard of review applies, *amici* submit that, in light of the specific evidence of actual voter fraud in Michigan and elsewhere described *infra* §II.A.2, Michigan's photo identification provisions would also satisfy strict scrutiny.

enhancing public confidence in the electoral process. The importance of these State interests are beyond doubt: "It must be remembered that 'the right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). "Free and honest elections are the very foundation of our republican form of government. Hence any attempt to defile the sanctity of the ballot cannot be viewed with equanimity." *United States v. Classic*, 313 U.S. 299, 329 (1941). Voter fraud and voter suppression are two sides of the same repugnant coin.

The United States Supreme Court has expressly recognized that the governmental interests asserted here – preventing fraud and increasing public confidence in the electoral process – are "interests of the highest importance":

> Preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978) (citations, internal quotations omitted).[5]

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[5] Or, as the Supreme Court explained more than 120 years ago:

> In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger . . . . Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.

If anything, the scope of the Legislature's authority to combat fraud or potential fraud is *stronger* in Michigan than elsewhere. The Michigan Constitution expressly imposes the *mandatory duty* on the Legislature to promulate election regulations, and in particular to enact measures "to preserve the purity of elections" and "guard against [election] abuses":

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or the constitution and laws of the United States. *The legislature shall enact laws to preserve the purity of elections*, to preserve the secrecy of the ballot, *to guard against abuses of the elective franchise*, and to provide for a system of voter registration and absentee voting.

Mich. Const. Art. 2, § 4 (emphasis added). The Comment of the Constitutional Convention emphasizes that Article 2, § 4 "vests in the legislature full authority over election administration," and that, under the provision, "*[t]he legislature is specifically directed to enact corrupt practices legislation.*" (Emphasis added).

This Court has recognized that Article 2, §4 gives the Legislature broad discretion to regulate the manner in which Michigan elections are held:

> The power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association, is reposed in the Legislature as one of the three co-equal branches of government by art. 1 of the Michigan Constitution. The

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Ex parte Yarbrough (The Ku-Klux Klan Cases), 110 U.S. 651, 666 (1884). *See also Smiley v. Holm*, 285 U.S. 355, 366 (1932) (State authority under Article I, sec. 4 includes measures aimed at the "prevention of fraud and corrupt practices"; Article I, sec. 4 empowers States "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved"); *United States v. Mosley*, 238 U.S. 383, 386 (1915) ("We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.").

> enactment of laws designed to assure the protection and enhancement of such rights is therefore a particularly proper legislative concern.
>
> For example, by a specific grant of power from the people in art. 2 of the state constitution, the Legislature has been given the responsibility of regulating nominations and elections, providing for the registration of voters, declaring their eligibility within constitutional limits and, in general, enacting laws guaranteeing in myriad ways the rights of citizens to participate in the political process and exercise the elective franchise.

Council No. 11, AFSCME v. Michigan Civil Serv. Comm'n, 408 Mich. 385, 394-95, 292 N.W.2d 442, 445-46 (1980) (footnote omitted).

Michigan cases likewise recognize that, so long as a challenged regulation does not completely deny the right to vote, the Legislature has broad discretion to regulate election procedures:

> Under these broad provisions, it has been frequently held to be the exclusive province of the Legislature to enact laws providing for the registration of voters, and the time, place, and manner of conduction elections. It may regulate, but cannot destroy, the enjoyment of the elective franchise. Whether such regulation be reasonable or unreasonable is for the determination of the Legislature, and not for the courts, so long as such regulation does not become destruction.

Andrews v. Branigin, 21 Mich. App. 568, 572, 175 N.W.2d 839, 841 (1970) (quoting *Brown v. Board of Election Comm'rs*, 174 Mich. 477, 480, 140 N.W. 642, 643 (1913); other citations and internal quotations omitted).

2. Recent Evidence Confirms the Need for Measures To Prevent In-Person Voter Fraud.

These judicial declarations are substantiated by widespread evidence of voter fraud, or at a minimum the circumstances that create an unacceptable risk of such fraud. In particular, there is ample, recent evidence of in-person voter fraud, or a risk of such fraud – the specific evil which photo identification requirements seek to prevent.

This Court need look no further than Michigan itself for such evidence. In September of 2004, campaign workers in many Michigan counties were investigated for submitting thousands of fraudulent voter registrations. *Campaign Workers Suspected Of Fraud*, Detroit Free Press (Sept. 23, 2004). Fraudulent activities occurred in Wayne, Oakland, Ingham and Eaton counties. Mike Bryanton, the Ingham County Clerk, stated that fraudulent registrations included "names taken out of the phone book and as many as eight people registered from a single apartment address." *Id.* State Elections Director Christopher Thomas claimed that the "irregularities were like nothing he had seen before." *Id.*

The concerns continued in the City of Detroit 2005 elections. An October 30, 2005 *Detroit News* report raised serious questions about the administration of City of Detroit elections. *Absentee Ballots Tainted?*, Detroit News (Oct. 30, 2005). Among the report's findings were ballots cast by people registered to vote at abandoned and long demolished buildings, a master list with 380,000 incorrect names and addresses – including people who have died or moved out of the city, and a practice of hand-delivering ballots from senior citizens and disabled voters that were filled out in private meetings with the Defendant's paid election workers. (According to the *Detroit Free Press*, as many as 299,000 of 644,351 names on the City of Detroit's registered voter list may be fraudulent. *Many names on city's voter lists may not belong*, Detroit Free Press (Nov. 3, 2005).)

In addition, the *Detroit News* investigation indicates that for the August primary election, proper election procedures were not followed in nearly 40% of certain precincts

selected for a recount, which meant candidates had no way of determining the "legitimacy of the vote" in these precincts. The article indicated that even Democratic election consultants believe that dead people vote in the City of Detroit. *See also In Michigan, Even Dead Vote*, Detroit News (Feb. 26, 2006) (reporting that at least 132 deceased persons listed as having voted in November 2005 elections). The fact that votes were cast in the names of deceased individuals is dramatically illustrated by comparing the death certificates – and voting records for the same deceased individuals – included in the Appendix to the Michigan Republican Party's Brief. The United States Department of Justice is investigating allegations that some votes in the Detroit election were cast in the names of dead people. *Hendrix Ready To Ask For End To Recount*, Associated Press (Dec. 27, 2005). Even where "live" people voted, suspicious ballots were uncovered which appeared to have been filled in by the same person. *Suspicious Ballots Uncovered in Detroit Recount*, Fox News (Dec. 13, 2005).

Because of widespread problems during the August 2005 primary, the Wayne County Circuit Court appointed the state Elections Director and Wayne County Clerk to oversee the general election. *Hendrix Drops Recount, Wants Election Reform*, Detroit News, (Dec. 28, 2005). Concerns regarding voter fraud and other election irregularities nevertheless persisted. While defeated mayoral candidate Freeman Hendrix ultimately dropped his demand for a recount of the general election results, in doing so he advocated election reforms – including a photo identification requirement – to limit voter fraud in future elections. David Josar, *Hendrix Drops Recount, Wants Election Reform*, Detroit

News (Dec. 28, 2005); *Detroit Recount Decision Bolstered by Reform Ideas: Hendrix is Right that System Needs Drastic Overhaul*, Detroit News (Dec. 29, 2005).

This phenomenon is not limited to Michigan. The September 2005 Carter-Baker report provides several examples:

> The November 2004 elections also showed that irregularities and fraud still occur. In Washington, for example, where Christine Gregories was elected governor by a 129-vote margin, the elections superintendent of King County testified during a subsequent unsuccessful election challenge that ineligible ex-felons had voted and that votes had been cast in the names of the dead. . . . In Milwaukee, Wisconsin, investigators said they found clear evidence of fraud, including more than 200 cases of felons voting illegally and more than 100 people who voted twice, used fake names or false addresses, or voted in the name of a dead person. . . . By one estimate, for example, there were over 181,000 dead people listed on the voter roles in six swing states in the November 2004 elections, including almost 65,000 dead people listed on the voter rolls in Florida.[6]

There are many more examples:

- The Chicago Tribune published an analysis in December 2004 finding that Florida had more than 64,000 dead people on its voter rolls,[7] the New York Daily News has reported that some 46,000 people were illegally registered to vote in both Florida and New York City (and that between 400 and 1,000 registered voters voted twice in at least one election),[8] and the Cleveland Plain Dealer reported that more than 27,000 people were listed as active voters in both Ohio and Florida (and that as many as 400 registered voters voted in both states in the same election in the last four years).[9]

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[6] *Building Confidence in U.S. Elections*, Report of the Commission on Federal Election Reform (Sept. 2005) (footnotes omitted) (available at http://www.american.edu/ia/cfer/report/report.html).

[7] Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, Chicago Tribune (Dec. 4, 2004).

[8] Russ Buettner, *Exposed: Scandal of Double Voters*, New York Daily News (Aug. 22, 2004).

[9] Scott Hiaasen, Dave Davis and Julie Carr Smyth, *Voters Double-Dip in Ohio, Fla.*, Cleveland Plain Dealer (Oct. 31, 2004).

- In May 2004, the Missouri State Auditor released an audit finding that the St. Louis Election Board's voter files included dead people, felons and Illinois residents. The audit found that "nearly 10 percent, or 24,000 of the city's registered voters, are either dead, [have] been convicted of a felony, [are] registered in another jurisdiction or otherwise [are] questionable."[10] In September 2004, the Kansas City Star reported that more than 300 people may have voted twice in the same election in Missouri in 2000 and 2002, though the number "could be even higher."[11]

- The U.S. Department of Justice has sued Missouri over its inflated voter rolls, noting that in some jurisdictions more than 150% of the voting age population was registered to vote.[12]

- "Hundreds of Coloradoans are being investigated for voter fraud in the November [2004] elections. Prosecutors in at least 47 counties are probing cases involving accusations of forged signatures, felons voting or people who attempted to vote twice."[13]

- A joint federal-local law enforcement task force found "clear evidence of fraud in the Nov. 2 [2004] election in Milwaukee," including hundreds of felons and "more than 100 individual instances of suspected double-voting, voting in names of persons who likely did not vote, and/or voting in names believed to be fake."[14]

- It was reported in January that the FBI and U.S. Attorney's office were investigating 59 cases of double voting in Duval County.[15] And Broward

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[10] *Audit Critical of City Election Board*, The Associated Press (May 26, 2004).

[11] Greg Reeves, *One Person, One Vote? Not Always*, The Kansas City Star (Sept. 5, 2004).

[12] *United States v. Missouri*, No. 2:05-cv-04391-NKL (W.D. Mo. filed Nov. 22, 2005).

[13] Susan Greene and Karren E. Crummy, *Voter Fraud Probed in State*, The Denver Post (March 24, 2005).

[14] Greg J. Borowski, *Inquiry Finds Evidence of Fraud in Election*, Milwaukee Journal Sentinel (May 11, 2005); *Preliminary Findings of Joint Task Force Investigating Possible Election Fraud* at 2 (May 10, 2005).

[15] David DeCamp, *Double Voting Being Investigated*, Florida Times-Union (Jan. 25, 2005).

> County Officials referred at least 30 cases of double voting to the Florida Department of Law Enforcement.[16]

In light of evidence such as this, the Carter-Baker Commission concluded that there is "no doubt" that enough voter fraud occurs to justify photo identification at the polls.[17]

Besides his (erroneous) legal conclusion that a "strict scrutiny" analysis applied. Attorney General Kelley's Opinion No. 6930 was based on his view that "the State of Michigan is not experiencing any substantial voter fraud," and that "[t]he prevention of voter fraud has already been accomplished by less drastic means . . .." This determination is doubly flawed. *First*, as shown *infra* § II.D, under the appropriate legal standards the Legislature is not required to marshall court-admissible evidence of actual fraud before it can enact reasonable election regulations. But *second*, as shown above, Attorney General Kelley's belief that circumstances posing a considerable danger of voter fraud had been eliminated in Michigan "by less drastic means" has been disproven by recent events (if it were even accurate when issued).

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[16] Amy Sherman, *Double-Voters Names Going to Prosecutors*, The Miami Herald (Nov. 14, 2004).

[17] Commission Report at 18; *see also Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections."). For historical background on the problem of election fraud in the United States, *see generally* Tracey Campbell, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION – 1742-2004 (2005); John Fund, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004).

3. Concerns Over Voting Fraud Have Caused a Substantial Decline in Public Confidence in American Elections.

Given the evidence described above, it is hardly surprising that the Carter-Baker report found "that only one third of the American people said that they had a lot of confidence that their votes would be counted properly, and 29 percent said they were very or somewhat concerned that they would encounter problems at the polls." Report § 1, *supra* note 6.

The jaundiced views of the American public concerning the integrity of elections justify a governmental response – particularly since cynicism as to the integrity of the electoral process will inevitably reduce voters' motivation to participate in that process, the cornerstone of American democracy. Significantly, there is some evidence that implementation of reasonable photo identification requirements, like those contained in 2005 PA 71, may well restore at least some measure of public confidence in the electoral process. Photo identification requirements enjoy widespread public support (which is hardly surprising given the common sense nature of this reform). For example, a Wall Street Journal/NBC poll conducted in April 2006 showed that 81% of respondents nationwide supported (and only 7% opposed) photo identification requirements.[18] Similar results were found in polls in Missouri (89% support) and Pennsylvania (82% support).[19]

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[18] Press Release, American Center for Voting Rights, *ACVR Legislative Fund Applauds NBC/WSJ Poll Finding 80% Support for Photo ID Requirement* (April 30, 2006), available at http://www.ac4vr.com/News.

[19] Press Release, American Center for Voting Rights, *Missourians Strongly Favor ID Plan* (March 23, 2006); Press Release, American Center for Voting Rights,

Some erroneously suggest that photo identification laws have an improper partisan motive: alleging that the laws help Republicans and hurt Democrats. Again, the evidence is to the contrary. As noted above, the bi-partisan Carter-Baker Commission on Federal Election Reform endorsed photo identification as a fraud prevention measure, including the support of former Democratic President Jimmy Carter, Democratic Congressman Lee Hamilton, and Democratic civil rights leader, Atlanta Mayor, and U.N. Ambassador Andrew Young, who testified before the Commission. Similarly, polling in Albuquerque, New Mexico, which recently enacted a photo identification requirement, indicates that such a measure was supported by 66% of Democrats and 92% of Republicans.[20]

When the issue of voter photo ID is placed on the ballot, there is strong bi-partisan support for the measure. Albuquerque voters, with the support of Hispanic Democrat Mayor Chavez adopted a photo ID requirement for all Albuquerque elections.[21] In

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Pennsylvanians Support ID Requirement at the Polls (Jan. 30, 2006), both available at http://www.ac4vr.com/News.

[20] Dan McKay, *Voter Picture ID Has Wide Support*, Albuquerque Journal (Aug. 24, 2005).

[21] Albuquerque voters supported photo ID by a 77-17 percent margin in a pre-election poll, as 92 percent of Republicans and 66 percent of Democrats supported measure. Dan McKay, *Voter Picture ID Has Wide Support*, Albuquerque Journal (Aug. 24, 2005). Polling showed photo ID with overwhelming support "among Republicans and Democrats, anglos and hispanics and across income levels" in Albuquerque. *Id.* Thus, Albuquerque's Democratic Mayor, Martin Chavez, stated that "[i]ntegrity of the voting process is essential. I worked closely with Councilors Mayer and Cadigan to put photo ID onto the ballot." Jim Ludwick, *Critics: Mail-in voters should show ID, too*, Albuquerque Journal (Sept. 12, 2005). The measure apparently caused no administrative difficulties: Albuquerque "City Clerk Judy Chavez and other election officials said the rule change didn't cause any problems." *New ID rule passes test*, Albuquerque Journal

Arizona, voters passed a popular state-wide initiative (Proposition 200) that required prospective voters to present proof of citizenship before registering to vote.[22] The Arizona proof of citizenship requirement was recently upheld in an initial decision in the federal court.[23]

4. Reasonable Photo Identification Requirements Represent a Legitimate Governmental Response To the Risks of Voter Fraud and Eroding Public Confidence in the Electoral Process.

Voter identification laws—including photo identification requirements—are an obvious method for reducing voter fraud. Photo identification could prevent—or at least greatly reduce the risk of—people voting in the names of dead people or individuals who

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(Nov. 16, 2005). Similarly, "Shirley Bartel, an Election Clerk at Chelwood Elementary School, said many voters had their Ids out already when approaching the polls. 'They said, "It should've been done a long time ago. It makes for a more honest election,"' Bartel said." *Id.*

[22] *See Lawsuit off base in challenging voter ID rules*, Arizona Daily Star (May 15, 2006).

[23] Proposition 200 was passed overwhelmingly by Arizona voters in 2004. This popular initiative requires those seeking to register to vote in Arizona to provide proof of U.S. citizenship when registering. On May 9th ACLU, People for the American Way and other liberal activist organizations filed a federal lawsuit seeking to eliminate the citizenship requirement because, they claimed, it was contrary to the federal National Voter Registration Act ("Motor Voter"). On June 19th, Federal District Judge Rosyln O. Silver denied the plaintiff's request for a Temporary Restraining Order finding that the plaintiff's had "no[t] shown that there is a likelihood they will succeed on the merits." Judge Silver wrote: "Determining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote. In fact, the NVRA repeatedly mentions that its purpose is to increase registration of 'eligible citizens.' Providing proof of citizenship undoubtedly assists Arizona in assessing the eligibility of applicants. Arizona's proof of citizenship requirement does not conflict with the plain language of the NVRA." *Gonzales v. Arizona*, CV 06-1268 PHX ROS (D. Ariz., June 19, 2006).

have left the state but whose names are still on the voter rolls. Indeed, without a photo identification requirement, in-person voter-identity fraud is virtually impossible to detect.

Thus, it is not surprising that the bi-partisan Carter-Baker Commission on Federal Election Reform, which was formed to propose ways to increase confidence in the electoral system, recommended a photo identification system. As the report explained:

> Building confidence in U.S. elections is central to our nation's democracy. At a time when there is growing skepticism with our electoral system, the Commission believes that a bold new approach is essential. The Commission envisions a system that makes Americans proud of themselves as citizens and of democracy in the United States. We should have an electoral system where registering to vote is convenient, voting is efficient and pleasant, voting machines work properly, *fraud is deterred*, and disputes are handled fairly and expeditiously.
>
> This report represents a comprehensive proposal for modernizing our electoral system. We propose to construct the new edifice for elections on five pillars:
>
> . . . .
>
> Second, to make sure that a person arriving at a polling site is the same one who is named on the list, we propose a uniform system of voter identification based on the "REAL ID card" or an equivalent for people without a drivers license.

Report of the Commission on Federal Election Reform, *supra* note 6, Letter from the Co-Chairs and Executive Summary (emphasis added).[24]

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[24] *See also id.*, Recommendation 2.5.1 (emphasis added):

> To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card included a person's full legal name, date of birth, a signature (captured as a digital image), *a photograph* and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back

Given the common-sense nature of this reform, a growing number of states have adopted photo identification requirements: Florida, Georgia, Hawaii, Indiana, Louisiana, South Dakota, Missouri and Ohio. *See* Fla. Stat. § 101.043; Ga. Code Ann. § 21-2-417(a); La. Rev. Stat. Ann. § 18-562(A)(2); Mo. Sen. B. 730, 1014 (2006); S.D. Codified Laws § 12-18-6.1. Moreover, photo identification provisions are pending in Wisconsin[25] and in the United States Senate.[26]

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whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to non-drivers free of charge.

[25] Provisions were also passed recently by the legislatures in Pennsylvania, New Hampshire and Minnesota, but vetoed by those States' governors.

[26] The federal Help America Vote Act ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of Titles 2, 5, 10, 36, and at 42 U.S.C. § 15481 *et. seq.*), demonstrated bi-partisan recognition of the three principles essential to any fair and honest election: (1) a current and accurate voter roll; (2) safeguards to assure that the person casting a ballot is reliably identified to be that individual registered to vote; and, (3) accurate and unbiased administration of the election to properly count and report each vote cast. Section 303(b) was specifically included in HAVA to address vote fraud and provides minimum requirements for identification of voters who register by mail, including presentation of photographic identification. *See*, *Hearing on H.R. 3295 Before the H. Comm. on the Judiciary*, 107th Cong. (2001), available at 2001 WL 1552086 (F.D.C.H.) (statement of Rep. F. James Sensenbrenner, Jr.) (identifying that vote fraud was a significant motive for the anti-fraud provisions of HAVA); *Remarks by President Bush at Signing of H.R. 3295, Help America Vote Act of 2002* (Oct. 29, 2002), 2002 WL 31415995 (White House), at *2. Section 303(b) of HAVA provides for a non-photo identification alternative of "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." The HAVA voter identification standards were expressly stated to be a "floor" and not a "ceiling". HAVA explicitly provides that it shall not "be construed to prevent a State from establishing election technology and administration requirements that are more strict than" provided in HAVA.

B. Photo Identification Provisions Impose At Most A Minor Burden on the Right to Vote

Photo identification requirements such as those adopted in Michigan impose, at most, a minor burden on the right to vote.[27] The actual act of presenting photo identification is clearly not a substantial burden; indeed, most Americans experience such requirements routinely, at airports, upon entering government offices and many private office buildings, when purchasing tobacco or alcohol products, or when paying for goods or services by check. Nor is the requirement to obtain a photo identification a substantial burden. Michigan's voter identification law expressly permits voters unable to present a photo identification to "sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act."

As a result, this law can hardly be considered a "severe" burden to exercising the right to vote, such that it could trigger a strict-scrutiny analysis.[28] In fact, by improving

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[27] In considering the alleged potential burdens which *Amici* expect other parties will claim, it is significant that the question before this Court concerns only the constitutionality of 2005 PA 71 *on its face*. The fact that, the photo identification requirement *might* conceivably burden *someone* in a hypothetical factual scenario is insufficient to show facial unconstitutionality. *See, e.g., Rose v. Stokely*, 258 Mich. App. 283, 305-06, 673 N.W.2d 413 (2003).

[28] In this regard it is significant that both federal Courts of Appeals that have considered the issue have stated that requiring a voter to provide a social security number to register to vote does not violate the Constitution, even though obtaining a social security number obviously takes some effort. *See McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) ("We reject McKay's claim that his fundamental right to vote was unconstitutionally burdened by the social security number disclosure requirement."); *Greidinger v. Davis*, 988 F.2d 1344, 1354 n.10 (4th Cir. 1993) (striking down Virginia law requiring *public disclosure* of Social Security Number as prerequisite to voter registration; noting that "[i]f the scheme provided for only the receipt and internal use of the SSN by Virginia, no substantial burden would exist.").

voter confidence in the system, voter identification laws (such as photo identification laws) may actually help increase voter turnout.[29]

C. Photo Identification Rules Are Nondiscriminatory

It is also clear that photo identification requirements are nondiscriminatory. "Discriminatory" in this context cannot refer simply to a difference in treatment, since virtually every regulation treats some people differently from others. As the Seventh Circuit has recognized, "any such restriction [on voting] is going to exclude, either *de jure* or *de facto*, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1131-33 (7th Cir. 2004) (upholding Illinois law allowing only certain persons to vote by absentee ballot).

Rather, in this context discriminatory means differentiating between individuals on some improper basis, such as race or wealth. As the Supreme Court has explained:

> [W]hile the "States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised," we have held that once the States grant the franchise, they must not do so in a discriminatory manner. *See Carrington v. Rush*, 380 U.S. 89 (1965). More importantly, however, we have held that because of the overriding importance of voting rights, classifications "which might invade or restrain them must be closely scrutinized and carefully confined" where those rights are asserted under the Equal Protection Clause; *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966). And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper v. Virginia State Board of Elections*, two factors which would

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[29] Of course, photo identification laws would be constitutional even if they did have some negative impact on turnout. "[S]triking the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

> independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas v. California*, 372 U.S. 353 (1963); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).
>
> Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race.

McDonald v. Board of Election Comm'rs, 394 U.S. 802, 806-07 (1969) (upholding state's decision not to provide absentee ballots to pretrial detainees even though they were available to others and even though this obviously had a differential impact on pretrial detainees) (certain citations omitted).[30] And the Supreme Court has regularly upheld statutes that have some differential impact on voters as long as they are reasonable and serve important government interests (such as preventing voter fraud). *See, e.g.*, *Rosario v. Rockefeller*, 410 U.S. 752, 757-58 (1973) (applying rational basis scrutiny to state law conditioning right to vote in a party primary on voter's registering as a party member thirty days prior to previous general election even though that would obviously have a differential impact on people who had not so registered); *Clingman v. Beaver*, 544 U.S. 581 (2005) (upholding Oklahoma's semiclosed primary law—under which a party may invite only its own members and voters registered as Independents to vote in its primary—even though it would clearly have a differential impact on different voters); *cf. Storer v. Brown*, 415 U.S. 724 (1974) (upholding California law requiring candidates seeking ballot positions as independents to have been politically disaffiliated for at least

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[30] The *McDonald* Court also noted that the record did not establish that Illinois might not provide some other manner for pretrial detainees to vote besides absentee ballot and that "there is nothing to show that a judicially incapacitated pretrial detainee is absolutely prohibited from exercising the franchise." *Id.* at 807, 809 & n.6.

one year prior to the immediately preceding primary election and imposing voter nomination requirements even though those provisions would clearly have a differential impact on different candidates); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding Washington's law requiring minor-party candidate to receive at least 1% of votes cast in a primary election before his name could be placed on the general election ballot even though it clearly had a differential impact on some candidates); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding Minnesota antifusion law that prohibits candidates from appearing on ballot as candidates of more than one party, even though it clearly had a differential impact on some candidates).[31]

Amici anticipate that other parties may claim that photo identification laws may have the effect of disenfranchising minority voters; but the evidence is to the contrary. Experience has shown that minority voter participation has *increased* under voter identification regimes. For example:

> in the November 2000 election, the first presidential election in which Georgia's original identification requirement was in effect, the Census Bureau reported that turnout of eligible African-American voters *increased* from the 1996 election, from 45.6% to 49.6%. . .. In the November 2004 presidential election, when the new identification requirements of the Help America Vote Act of 2002 ("HAVA") [requiring identification documents upon registration or at the polling place for first-time voters] were effective nationwide, the Census Bureau reported that the turnout among African-American voters in Georgia went up again, from 49.6% to 54.4%.
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> ....

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[31] These cases involving the rights of candidates to appear on the ballot are relevant to the analysis for voter qualifications. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

> Other states with large minority populations, including Florida, Alabama, Louisiana and Virginia, have identification requirements similar to those in Georgia, yet have had no negative effect on the turnout of minority voters according to available data. Florida, for example, passed an identification requirement in 1998. Yet African-American turnout in the presidential election, as a percentage of registration, actually increased from the 1996 to the 2000 election, and, significantly, at a higher rate than white turnout. After Alabama passed an identification requirement in 2002, the turnout rate of its African-American voters as a percentage of registration rose by 8.3 percentage points from the 2000 to the 2004 presidential election, or over twice the rate of increase among white voters, and the turnout rate among African-American voters in Alabama actually exceeded that of white voters.

Letter from United States Assistant Attorney General William E. Moschella to Senator Christopher Bond (Oct. 7, 2005), available at http://www.usdoj.gov/crt/voting/nisc/ga_id_bond_ltr.htm.[32]

With the close decision in the Mexican presidential election this month, it is worth noting measures that Mexico takes to assure voter confidence in a fair and honest election.

> Mexico spends much more than the U.S. on measures to prevent vote fraud. All voters in Mexico must present voter IDs at the polls, which include not only a photo but also a thumbprint. The IDs themselves are essentially counterfeit-proof, with special holographic images, imbedded security codes, and a magnetic strip with still more security information. As an extra precaution, voters' fingers are dipped in indelible ink to prevent them from voting multiple times.
>
> Voters cannot register by mail - they have to go in person to their registration office to fill out forms for their voter ID. When a voter card is ready three months later, it is not mailed to the voter as it is in the U.S. Rather, the voter has to make a second trip to a registration office to pick it

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[32] Obviously, factors other than the voter identification requirements may have caused the increase in minority turnout. At the very least, however, this evidence rebuts any claim that such requirements discriminate against, or disenfranchise, minority voters.

> up. Sunday's election was the first in which absentee ballots were available, but only if for voters requested one at least six months before the election.[33]

The U.S. Department of Justice has (in those jurisdictions requiring pre-clearance under Section 5 of Voting Rights Act 42 U.S.C.§ 1973 *et. seq*). approved voter identification requirements in Virginia, Georgia, Arizona and New Mexico. Georgia was approved twice. The initial Georgia voter identification law was initially enjoined because the district court found that Georgia did not provide sufficient opportunity for

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[33] John R. Lott Jr. & Maxim C. Lott , *Look South: Americans Could Learn from Mexican Elections*, National Review On-Line (July 6, 2006), available at http://article.nationalreview.com/. Mexico is not alone. Even the impoverished nation of Haiti requires photo voter identification. *See* Washington Post (Feb. 6, 2006). "John Lott, a scholar at the American Enterprise Institute, notes that in the three presidential elections Mexico has conducted since the National Election Commission reformed the election laws '68% of eligible citizens have voted, compared to only 59% in the three elections prior to the rule changes.' People are more likely to vote if they believe their ballot will be fairly counted." John Fund, *How to Run a Clean Election, What Mexico can teach the United States*, Wall Street Journal (July 10, 2006).

voters to obtain the voter ID.[34] Georgia remedied these objections in early 2006 with new provisions to assure access to the required free photo ID.[35]

The neighboring state of Indiana's experience with a recently enacted voter ID statuate illustrates that the claims of those who assert such a voter identification requirement will "disenfranchise" legitimate voters is unfounded. After the district court affirmed the constitutionality of the Indiana voter identification law a state-wide election was held. This election was notable for the absence of any voter experiencing difficulty with Indiana's new voter identification requirement.[36]

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[34] The Georgia Legislature passed HB 244 in 2005. HB 244 required voters to show any of six government-issued photo IDs at the polls: a driver's license, passport, military ID, government employee ID, tribal ID or a valid ID card issued by the state or federal government. Residents who did not have any of the six required IDs had to get a state-issued photo ID (a five-year card cost $20; 10-year cards, $35) in order to vote. For those who could not afford them, the fees could be waived with a signed indigency affidavit. Indigent was not defined and the affirmation was under oath, so the district court concluded that this ambiguity would present a burden to some truly indigent voters who, in the face of an undefined standard of indigency, would not affirm their indigency. Secondly, the district court held that Georgia did not afford opportunity for access to free voter ID. Fulton County, where Atlanta is located, did not have a single location where a free photo identification could be obtained. The District court faulted the Georgia law on essentially these two points. *Common Cause v. Billups*, 406 F.Supp.2d 1326 (N.D. Ga. 2005)

[35] Georgia Senate Bill 84. was passed in January 2006 and provided a free voter photo ID card to anyone who requested without the requirement of an affidavit of indigency Senate bill 84 also required that all 159 counties in Georgia maintain a location where the free photo IDs can be obtained. There is currently pending a Georgia state court challenge to the statute arguing that it violates provisions of the Georgia state constitution.

[36] The *Journal Gazette* in Fort Wayne wrote: "Election Day calm as voters comply with photo ID rule. . . . Despite months of debate culminating in a federal lawsuit, Indiana's new requirement that voters show photo identification at the polls caused barely a ripple in Tuesday's primary election. Across Indiana, there were no reports of problems caused by the new requirement, with most areas reporting they did

D. Photo Identification Laws Are a Constitutional Step for States To Take To Combat Actual or Potential Voter Fraud.

With this background, it is clear that photo identification laws easily pass the flexible test set forth in cases like *Burdick*, *Clingman* and *Timmons*. They are nondiscriminatory steps that reasonably advance important government interests, and impose at most minimal burdens on the right to vote. Under the "flexible standard" which applies here, the Legislature need not have had actual, admissible empirical evidence to support its determination that photo identification requirements constituted sound governmental policy; but even if such an evidentiary requirement existed, it is satisfied by the evidence described above, of actual voter fraud or circumstances creating an appreciable risk of such fraud, in Michigan and nationwide.

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not have to turn away a single voter; those that did turn voters away for lack of identification found it to be a rare exception. ...Voters casting ballots at the Fort Wayne Urban League in the Hanna Creighton neighborhood – with the highest concentration of poor and minorities in the city – did not have to turn away a single voter, workers said. ...In Noble County, precinct officials at three voting locations said that as of midafternoon Tuesday no one who wanted to vote was turned away because they didn't have proper identification." Dan Stockman, Fort Wayne Journal Gazette (May 3, 2006).

The *Star Press* in Muncie wrote, "Only one provisional ballot was cast in most of the 10 precincts polled by The Star Press, indicating the photo ID requirement was not a problem. Provisional ballots are cast for voters who cannot show a photo ID." The *Indy Star* reported , "Tuesday's primary election came and went with few hitches despite a new state law requiring all voters to show a photo ID. The low-key election dispelled fears that the new ID law, ballot typos and printing errors in Marion County and elsewhere, as well as glitches with some voting machines and the state's voter-registration database, would result in widespread problems at the polls. 'All the sky-is-falling-Chicken-Little arguments never came to fruition,' Indiana Secretary of State Todd Rokita said." Rick Yencer, Indy Star (May 3, 2006).

It is clear that, with respect to electoral regulations as elsewhere, legislatures may act to address a potential problem on a prophylactic basis, and need not wait until it becomes a full-fledged crisis.

> Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutional rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986); *see also Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."); *Timmons*, 520 U.S. at 364 ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justification.").

Moreover, legislative action is appropriate to avoid the *appearance* of fraud as well as its actual occurrence. *See, e.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93, 143 (2003) ("Our cases have made clear that the prevention of corruption *or its appearance* constitutes a sufficiently important interest...")(emphasis added); *National Right to Work Comm.*, 459 U.S. at 208 (observing "the importance of preventing . . . the eroding of public confidence in the electoral process through the appearance of corruption"); *In re Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich. 465, 492, 242 N.W.2d 3, 13-14 (1976) (sustaining limitations on corporate campaign contributions against equal protection challenge based on potential that such contributions "*could have* a significanct impact upon the nomination or election of a candidate," "[t]he *possibility* of misuse of corporate assets," and the potential that

corporate pressure "*might be exerted* upon a successfully elected candidate"); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (upholding campaign contribution limits in part to avoid "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse").

The State was fully entitled to address the occurrence or potential for in-person fraud in 2005 PA 71, even though other mechanisms (*e.g.*, absentee balloting) may *also* raise concerns. The order in which to address actual or potential problems in the electoral system (or in other areas) are quintessentially legislative judgments that will not be interfered with by the courts absent a constitutional violation. As the Court explained in upholding the Illinois absentee voter law that excluded pretrial detainees from those entitled to vote by absentee ballot:

> With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

McDonald, 394 U.S. at 809 (citations omitted); *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (" Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."); *Semler v. Oregon*

State Board of Dental Examiners, 294 U.S. 608, 610 (1935) (Holmes, J.: "The state was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way."); *In re Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich. 465, 493, 242 N.W.2d 3, 14 (1976).

CONCLUSION

Photo identification laws, such as the one enacted in Michigan, are reasonable, common sense efforts to prevent voter fraud and increase voter confidence—two important (indeed compelling) State interests. They are nondiscriminatory, nonpartisan, and impose at most a minimal burden on the right to vote. They easily pass the flexible constitutional standard of review applicable under these circumstances.

States should remain free to adopt such reasonable, nondiscriminatory measures to promote the integrity of their electoral process. It is in the interest of all voters to ensure that the electoral system is fair, honest, and free from fraud, and that the public generally has faith in the integrity of the process.

This Court should find 2005 PA 71 to be constitutional. Further, because of the upcoming general elections, *Amici* respectfully request that this Court issues its Advisory Opinion affirming the constitutionality of 2005 PA 71 as expeditiously as possible based on the parties' and *amici*'s briefing, and without the delay inherent in scheduling the matter for oral argument.

Respectfully submitted,

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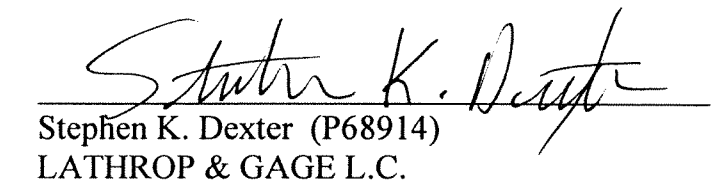

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2006, two true and correct copies of the foregoing were served by first-class mail, postage prepaid on the following:

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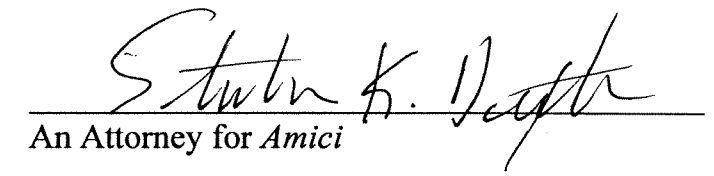

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